

**THE WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

**SUSAN HOOTON,
Grievant,**

v.

Docket No. 2014-1202-PreED

**PRESTON COUNTY BOARD OF EDUCATION,
Respondent.**

DECISION

Grievant, Susan Hooton, filed this grievance at level one against her employer, Preston County Board of Education, on March 17, 2014, requesting a conference. Her statement of grievance provides:

I was awarded twelve years of private sector service credit by Superintendent Larry Parsons in 2012. However, the current superintendent, Rick Hicks, recommended that I lose that private sector service credit and the State Superintendent upheld his decision. This is a violation of WV Code 18A-4-8(m).

Grievant seeks the following relief:

The remedy I am seeking is to continue to be paid for the twelve years of private sector credit that was awarded to me. I am seeking all back pay, with interest, to which I may be entitled.

Grievant was notified by letter dated February 20, 2014, from Superintendent Rick Hicks, that the twelve years of private sector experience credit and associated salary would be eliminated on July 1, 2014. Grievant requested and was granted a reduction in force hearing on February 27, 2014. By letter dated March 21, 2014, Grievant was notified by Superintendent Rick Hicks that the West Virginia Department of Education had approved the elimination of her private sector experience credit, effective July 1, 2014. Grievant

appealed this decision on March 31, 2014. A level two mediation session was conducted on July 18, 2014. Grievant perfected her appeal to level three on July 23, 2014. A level three hearing was conducted before the undersigned on December 18, 2014, at the Westover office of the Grievance Board. Grievant appeared in person and by her representative, Mary Snelson, West Virginia Education Association. Respondent appeared by its counsel, Gregory W. Bailey, Bowles Rice LLP. Rebecca M. Tinder subsequently filed a notice of substitution of counsel and submitted proposals on behalf of the Respondent. This matter became mature for consideration upon receipt of the last of the parties' fact/law proposals on January 23, 2015.

Synopsis

Grievant is challenging the elimination of her private sector work experience credit. The decision of the former superintendent to grant private sector experience credit, without approval from the Preston County Board of Education, the West Virginia Department of Education or the West Virginia Board of Education, was an error that the Respondent was required to correct. In addition, the decision of the former superintendent to grant the private sector experience credit was an unauthorized action. This grievance is denied.

The following findings of fact are based on the record of this grievance.

Findings of Fact

1. Grievant is employed by the Preston County Board of Education as an Executive Secretary. Grievant's duties include working for the superintendent and working on Federal Programs.

2. During the spring and summer of 2012, Grievant sought private sector experience credit and provided the necessary documentation to support the request to Assistant Superintendent Craig Schimdl.

3. After review of her outside work experience, Grievant was awarded twelve years of private sector experience credit by then Superintendent Larry Parsons in 2012.

4. Neither the Preston County Board of Education nor the State Board of Education approved Grievant's private sector experience credit and the additional salary.

5. Grievant was informed by letter dated February 20, 2014, that Superintendent Rick Hicks intended to recommend that the private sector experience credit that was previously granted to her be eliminated, effective July 1, 2014. The notice afforded her an opportunity for a hearing on the action.

6. The subsequent communication from Deputy Superintendent of Schools Charles Heinlein to Superintendent Hicks dated February 28, 2014, indicated that Grievant would have a reduction in force of private sector service credit.

7. By letter dated March 21, 2014, Grievant was informed that the West Virginia Department of Education had approved the elimination of her private sector experience credit.

8. The record established that the decision to grant private sector experience credit to the Grievant was made by former Superintendent Larry E. Parsons. Assistant Superintendent Craig Schimdl acknowledged that the decision was made without the involvement or knowledge of the Preston County Board of Education, the West Virginia Department of Education or the West Virginia Board of Education.

9. In a report issued by the Office of Education Performance Audits (OEPA) in November 2012, the Preston County Board of Education was cited for awarding credit for experience earned prior to being employed by the school system, noting that it was improper to grant such credit without a local policy and, if granted pursuant to a local policy, it must be granted in a uniform fashion.

10. The record did not support a finding that Grievant was granted private sector experience credit under the terms of an existing policy.

11. Assistant Superintendent Schmidl indicated that the voters of Preston County rejected the continuation of an excess levy, and that the excess levy that was in place expired on July 1, 2013. Assistant Superintendent Schmidl explained that the loss of the excess levy has had a significant adverse impact on the ability of the district to engage in discretionary spending.

Discussion

As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988). "A preponderance of the evidence is evidence of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." *Petry v. Kanawha County Bd. of Educ.*, Docket No. 96-20-380 (Mar. 18, 1997). In other words, "[t]he preponderance standard generally requires proof

that a reasonable person would accept as sufficient that a contested fact is more likely true than not.” *Leichliter v. W. Va. Dep’t of Health & Human Res.*, Docket No. 92-HHR-486 (May 17, 1993).

Grievant makes the argument that the non-relegation clause prohibits Respondent from reducing her salary. W. VA. CODE § 18A-4-8(m) provides as follows:

Without his or her written consent, a service person may not be:

(1) Reclassified by class title; or

(2) Relegated to any condition of employment which would result in a reduction of his or her salary, rate of pay, compensation or benefits earned during the current fiscal year; or for which he or she would qualify by continuing in the same job position and classification held during that fiscal year and subsequent years.

This argument fails because, as the undersigned as previously ruled, the decision of former Superintendent Parsons to grant Grievant prior private sector experience credit was an *ultra vires* act.¹ It is undisputed that this action was taken without the involvement of either the Preston County Board of Education or the West Virginia Board of Education.² As Respondent aptly points out in its fact/law proposal, an agreement by a county superintendent to increase the compensation of an employee is an *ultra vires* act and does not obligate a county board of education. *Clark, et al. v. Preston County Bd. of Educ.*,

¹*Ultra vires* acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts. *Guthrie v. Dep’t of Health and Human Serv.*, Docket No. 95-HHR-277 (Jan. 31, 1996). See, *Parker v. Summers County Bd. of Educ.*, 185 W. Va. 313, 406 S.E.2d 744 (1991); *Franz v. Dep’t of Health and Human Res.*, Docket No. 98-HHR-228 (Nov. 30, 1998).

²Preston County Schools have been operating under the supervision of the West Virginia State Department of Education for a number of years.

Docket No. 2013-2251-CONS (July 22, 2014), and *Cook v. Mason County Bd. of Educ.*, Docket No. 96-26-105 (Aug. 19, 1996). In addition, *ultra vires* acts of a government agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such unauthorized acts. *Porter v. Wayne County Bd. of Educ.*, Docket No. 2011-1337-CONS (Mar. 30, 2012).

The cases cited by Grievant, as well as other cases decided by this Board relating to the non-relegation clause, frame the non-relegation clause in terms of a factual analysis involving a change in terms of employment for a current fiscal year, and an alteration of the terms of a contract for the subsequent year resulting in a compensation change.³ In fact, most of the Board's cases involve a relegation of a condition of employment that has existed not only for a single year, but existed over the course of numerous years. Such is not the case in the instant grievance.

Grievant's rate of pay was altered because the Respondent recognized the compensation was in error, and corrected the mistake immediately upon becoming aware of the situation. This was brought to their attention in a report issued by the Office of Education Performance Audits (OEPA) in November 2012, the Preston County Board of Education was cited for awarding credit for experience earned prior to being employed by the school system, noting that it was improper to grant such credit without a local policy and, if granted pursuant to a local policy, it must be granted in a uniform fashion. The Grievance Board has long recognized that boards of education should be encouraged to correct their errors as early as possible. *Connors v. Hardy County Bd. of Educ.*, Docket

³See *Casto and Henson, et al., v. Putnam County Bd. of Educ.*, Docket No. 06-40-245 (Feb. 28, 2007); *Jackson v. Wayne County Bd. of Educ.*, 00-50-040 (Apr. 21, 2000).

No. 99-16-459 (Jan. 14, 2000); *Barrett v. Hancock County Bd. of Educ.*, Docket No. 96-15-512 (Dec. 31, 1997).

It appears from the record of this case that the Respondent and the West Virginia Department of Education acted within their authority to eliminate the private sector experience credit granted to the Grievant. It was also appropriate for Respondent to remove such experience credit within the context of the personnel season, and to afford her with notice and an opportunity for a hearing upon the proposed elimination of her private sector experience credit.

The following conclusions of law support the decision reached.

Conclusion of Law

1. As this grievance does not involve a disciplinary matter, Grievant has the burden of proving her grievance by a preponderance of the evidence. Procedural Rules of the W. Va. Public Employees Grievance Board 156 C.S.R. 1 § 3 (2008); *Holly v. Logan County Bd. of Educ.*, Docket No. 96-23-174 (Apr. 30, 1997); *Hanshaw v. McDowell County Bd. of Educ.*, Docket No. 33-88-130 (Aug. 19, 1988).

2. *Ultra vires* acts of a governmental agent, acting in an official capacity, in violation of a policy or statute, are considered non-binding and cannot be used to force an agency to repeat such violative acts. *Guthrie v. Dep't of Health and Human Serv.*, Docket No. 95-HHR-277 (Jan. 31, 1996). See, *Parker v. Summers County Bd. of Educ.*, 185 W. Va. 313, 406 S.E.2d 744 (1991); *Franz v. Dep't of Health and Human Res.*, Docket No. 98-HHR-228 (Nov. 30, 1998).

3. Grievant did not meet her burden of proof and establish a violation of any statute, policy, rule, or regulation that would entitle her to continue to receive a rate of pay awarded in error.

Accordingly this grievance is **DENIED**.

Any party may appeal this Decision to the Circuit Court of Kanawha County. Any such appeal must be filed within thirty (30) days of receipt of this Decision. See W. VA. CODE § 6C-2-5. Neither the West Virginia Public Employees Grievance Board nor any of its Administrative Law Judges is a party to such appeal and should not be so named. However, the appealing party is required by W. VA. CODE § 29A-5-4(b) to serve a copy of the appeal petition upon the Grievance Board. The Civil Action number should be included so that the certified record can be properly filed with the circuit court. See *a/so* 156 C.S.R. 1 § 6.20 (eff. July 7, 2008).

Date: March 3, 2015

Ronald L. Reece
Administrative Law Judge